at the price offered without proper investigation and any bargaining. I am also satisfied that if Mahesan had conducted himself in the best interest of the society from the beginning, the society could have bought the land direct from the owners through Rengasamy for the price Manickam paid for it ($456,000), if not less. It should be noted that even at the time when Manickam and Mahesan went to Penang to see the land, Rengasamy had not yet agreed to sell the land to Manickam. It was through his misconduct or breach of duty as an agent that Manickam's nominee, Periasamy, entered into agreement for the purchase of the land with the co-owners and that afterwards the land was transferred to Manickam first and then resold to the society almost immediately afterwards for $944,000. To my mind this very payment in the circumstances of the case is proof of loss to the society in the sum of $488,000, and this loss, in the words of Lord Maugham in *Taylor's* case, was actually sustained as a direct result of Mahesan's misconduct or breach of duty.

But from this sum, the amount spent on the clearing of squatters must be deducted, as the society would have to spend on this if it had purchased the land from the beginning. If I am not mistaken the amount shown for this expenditure is $45,000: see letter at page 724 of the appeal record.

I would therefore allow the cross-appeal and order Mahesan to pay the society compensation in the sum of $488,000 less $45,000 = $443,000 with interest at 5½%.

Appeal dismissed.

Cross-appeal allowed. Mahesan to pay compensation in the sum of $443,000 with interest 5½%.

Costs of claim for compensation in the court below, costs of the appeal and the cross-appeal and deposit to the society.

Azmi L.P. and **Suffian C.J.** concurred.

Order accordingly.

Solicitors: *Ng Ek Teong & Partners; Rithauddeen & Aziz.*

ROSLAN BIN KARIM & ORS. v. PUBLIC PROSECUTOR

[A.Cr.J. (Mohamed Azmi J.) September 13, 1974]
[Kuala Lumpur — Selangor Criminal Appeal Nos. 206, 213 & 201 of 1973]

Criminal Law and Procedure — Duty of defence to call witnesses in criminal trial — Failure to call witness — Adverse presumption.

There is no duty casts upon the defence in a criminal trial to call any witness and no adverse presumption should arise against an accused person for failure to call any particular witness.

Case referred to:-

(1) *Tan Foo Su* v. *Public Prosecutor* [1967] 2 M.L.J. 19 @ 20.

CRIMINAL APPEAL.

First appellant in person.

P. G. Segran for second appellant.

Inderjit Singh for third appellant.

Manjeet Singh (Deputy Public Prosecutor) for respondent.

Mohamed Azmi J.: The three appellants in this case were jointly charged in the Sessions Court Kuala Lumpur for armed robbery in furtherance of a common intention, an offence punishable under section 392 of the Penal Code to be read in conjunction with section 397. According to the evidence of the complainant, a caretaker of a brothel at Flat No. 62-4C Jalan Hicks, Kuala Lumpur, three persons walked into the brothel at about 9.00 p.m. on September 1, 1973, and one of them whom he identified as the first appellant (Roslan) dragged him into a room where he was assaulted and relieved of $180 cash at the point of a gun. Whilst this was going on, the other two persons alleged to be the second and third appellants stood guard — one in the hall and the other at the corridor. On the evidence before him, the learned President found all the three appellants guilty as charged and sentenced the first appellant to five years imprisonment and a fine of $1,000 in default one year's imprisonment in addition to six strokes of the rottan. As for the second appellant (Ali) and the third appellant (Wahab), he sentenced each of them to four years' imprisonment and a fine of $1,000 in default one year's imprisonment plus four strokes of the rottan. Before me, the first appellant has now appealed against sentence whilst the second and third appellants appealed against both conviction and sentence.

In this case, I find no merit in the appeal against sentence by the first appellant. He had four previous convictions for robbery and armed robbery and, in my view, the learned President had considered all relevant matters before passing sentence, and there is no ground why the sentence should run concurrently with the terms of imprisonment which the appellant was then serving. I would therefore dismiss the appeal of the first appellant and affirmed the sentence imposed by the learned President.

As regards the second and third appellants, who are members of the police force, the main ground of appeal against conviction is on the question of burden of proof which the learned President had placed on the defence. The defence of the second appellant was that he was at the scene of crime but denied taking any part; whilst the defence of the third appellant was one of alibi, in that he was on beat duty at Sungai Besi Town at the material time.

In his grounds of judgment, the learned President, firstly, criticised the defence for not calling witnesses to substantiate their story and, secondly, he had misdirected himself by requiring the appellants to establish their innocence. Thus, in dealing with the second appellant's story that his wife followed him to Kuang, the learned President had this to say:

"Why did he not call her as a witness? She could have corroborated his story.... I could hardly believe his story. I held he was not speaking the truth and that he failed to

establish his innocence of the crime and as such found him guilty and convicted him."

That, to my mind, is a misdirection. It is a cardinal principle in criminal law that the prosecution must prove the guilt of the accused, and there is no duty cast on an accused person to establish his innocence. As stated by Raja Azlan Shah J. (as he then was) in *Tan Foo Su* v. *Public Prosecutor*: [1]

"But it is not the duty of the accused person to prove his innocence, far less to produce or to bring a particular witness to support his story. Failure of the defence to produce a particular witness must not be made the subject of adverse comment by the court, otherwise it would amount to a misdirection."

As far as the second appellant is concerned, in my view, even if he was present at the scene of the crime, the mere fact of presence alone is not sufficient to connect him with the crime.

The learned President also made similar misdirection in the course of dealing with the defence of alibi of the third appellant. This is what he said:

"Again accused No. 3 did not produce any witnesses to corroborate his story. I found that he failed to create a doubt in my mind and accordingly found him guilty of the offence charged and convicted him."

From his grounds of judgment, it is clear that the learned President had misdirected himself in law by requiring corroboration of the defence story. There is no duty cast upon the defence in a criminal trial to call any witness and no adverse presumption should arise against an accused person for failure to call any particular witness.

In the circumstances, the appeal of the second and third appellants are allowed. The conviction and sentence are set aside, and the fine imposed, if already paid by the appellants, should be refunded to them.

Order accordingly.

Solicitors: *Manuel & Segran; Inderjit Singh.*

DOSHI v. YEOH TIONG LAY

[F.C. (Gill C.J. (Malaya), Raja Azlan Shah and Wan Suleiman F.J.J.) November 2, 1974]

[Kuala Lumpur — Federal Court Civil Appeal No. 117 of 1973]

Land Law — Transfer of property — Allegation that registered proprietor was party or privy to fraud — Actual fraud — Constructive fraud — Loan agreement in contravention of Moneylenders Ordinance — Agreement unenforceable — Even if void effective to vest title in registered proprietor — National Land Code.

Practice and Procedure — Application to enter final judgment — Principles applicable — R.S.C. 1957, O. 14.

The facts in this case were that the appellant was formerly the registered owner of premises in Kuala Lumpur. He obtained a loan of $130,000 from one Chooi Mun Sou and as collateral security for repayment of the loan, he deposited with the lender his documents of title to the premises and another piece of land belonging to him, together with two blank transfer forms duly executed by him. The loan was to be repaid together with interest thereon at 10% per annum within three months. The appellant having failed to repay the said loan, Chooi Mun Sou transferred the premises to Equitable Nominees Sendirian Berhad for a consideration of $100,000. Subsequently, Equitable Nominees sold and transferred the land to the respondent, who paid 10% of the purchase price and charged the premises to Equitable Nominees to secure payment of the balance of the purchase price. The respondent became the registered owner of the premises and subsequently gave written notice to the appellant to quit and deliver possession of the premises. The appellant having failed to comply with the demand, the respondent brought the action for recovery of possession. He applied for leave to enter final judgment against the appellant and this was opposed by the appellant. The appellant's contention before the High Court was that the loan agreement was a moneylending transaction and therefore in the circumstances illegal and unenforceable that Chooi Mun Sou and his wife were the sole shareholders and directors of Equitable Nominees and that the transfer to the company was void and constituted a fraud on the appellant; that as Chooi Mun Sou was the solicitor of the respondent his knowledge of the previous transaction must be imputed to the respondent; and that therefore the respondent had procured himself to be registered as proprietor of the premises in a manner which made it liable to be set aside. The appellant therefore asked that he be given unconditional leave to defend. The learned judge in the High Court granted leave to the respondent to enter final judgment and the appellant appealed.

Held: (1) in the circumstances the learned judge was quite right in holding that there were no issues of fact to be tried in court so that to that extent the appellant was not entitled to unconditional leave to defend;

(2) in this case the solicitor's knowledge of the fraud could not be imputed to the respondent;

(3) the doctrine of constructive notice is inapplicable to systems of registration in relation to transactions where priority and notice are governed by priority in or the fact of registration and the court will not readily apply the doctrine where the effect would be to invalidate a transaction in relation to the sale of land;

(4) even if the loan agreement was void as it was a moneylending transaction, the registration of the transfer to the respondent was effective to vest title in him as a registered proprietor notwithstanding that he acquired his interest under an instrument that was void;

(5) in the circumstances the learned judge had exercised his discretion correctly in ordering final judgment to be entered against the appellant.

Cases referred to:-

(1) *Roberts* v. *Plant* [1895] 1 Q.B. 597.

(2) *Evelyn Soh Hee Li* v. *Gan Tick Sun* [1959] M.L.J. 146, 148.

(3) *Wong See Leng* v. *C. Saraswathy Ammal* [1954] M.L.J. 141, 143.

(4) *Haji Abdul Rahman* v. *Mohamad Hassan* [1917] A.C. 209, 216.

(5) *Rolland* v. *Hart* (1870) Ch. App. 678, 681.

(6) *Stuart* v. *Kingston* (1923) 32 C.L.R. 309.

(7) *Bradley* v. *Riches* (1878) 9 Ch. D. 189.

(8) *Le Neve* v. *Le Neve* (1747) Amb. 436, 26 E.R. 1172.

(9) *Morland* v. *Hales and Somerville* (1911) 30 N.Z.L.R. 201.

(10) *Assets Co. Ltd.* v. *Mere Roihie* [1905] A.C. 176.

(11) *Tuck Guat Choo alias Ting Guat Choo* v. *Cheah Ah Hoe and Yong Pow Meng* [1932] M.L.J. 109.

(12) *Fraser* v. *Walker* [1967] 1 All E.R. 649.

(13) *Breskvar* v. *Wall* (1972) 46 A.L.J.R. 68, 70.

(14) *Culver* v. *Beard* [1937] 1 All E.R. 301, 306.

(15) *Hodges* v. *Harland & Wolff Ltd.* [1965] 1 W.L.R. 523, 526.

FEDERAL COURT.

R. R. Sethu for the appellant.

Lim Kean Chye for the respondent.